Supreme Court, U.S.
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No. 92-1873

In The

Supreme Court of the United States

October Term, 1992

KATHLEEN LESLIE,

Petitioner,

vs.

SCHOOL BOARD OF BROWARD COUNTY, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the Court, in its certiorari discretion, review *Leslie v. School Board of Broward County, Florida,* Case No. 92-4365 (11th Cir. 1993) (Pet. App. A1) which affirmed without opinion the District Court's (Southern District of Florida, Miami Division) unpublished March 24, 1992 Memorandum Opinion Granting Motion for Summary Judgment (Pet. App. at B1)?

Stated otherwise, are there special and important reasons for the Court's exercising its certiorari jurisdiction, the Eleventh Circuit not having rendered a decision which conflicts with any other Federal Court on the same matter in affirming the District Court's entry of summary judgment which correctly held that under Florida law, a non instructional annual contract school district employee does not have a property interest in continued employment beyond the expiration of the employee's annual appointment and that a meaningful opportunity for employee name clearing precludes a federal due process claim based on the alleged deprivation of a liberty interest?

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BRIEF IN OPPOSITION

Respondent, School Board of Broward County, Florida, opposes the issuance of a writ of certiorari to review the judgment and affirmance without opinion of the United States Court of Appeals for the Eleventh Circuit and the unpublished judgment and memorandum opinion of the United States District Court for the Southern District of Florida in the above-entitled case.

OPINIONS AND JUDGMENTS BELOW

On March 24, 1992, the United States District Court for the Southern District of Florida issued a Memorandum Opinion and Order granting the Defendant School Board of Broward County, Florida's (School Board) Motion for Summary Judgment with respect to Plaintiff Kathleen Leslie's (Leslie) federal claim that she was deprived of a constitutionally protected liberty and property interest without due process of law in violation of 42 U.S.C. §1983. In relevant part, the District Court held that under Florida law, a non-instructional annual contract school district employee, such as Petitioner Leslie, does not have a property interest in continued employment beyond the expiration of the employee's annual appointment. The District Court also held that the administrative hearing offered to and accepted by Petitioner Leslie, constituted a meaningful opportunity for employee name clearing and precluded a claim based on the deprivation of a liberty interest without due process of law.

On February 17, 1993, the United States Court of Appeals for the Eleventh Circuit affirmed, without opinion, the District Court's entry of summary judgment in favor of the School Board as to Leslie's federal claims. Leslie filed a Petition for Rehearing and Suggestion of Rehearing En Banc which was denied by Order dated May 7, 1993, in which it was stated that no member of the panel nor other judge in regular active service on the Eleventh Circuit had requested that the Eleventh Circuit be polled on the suggestion of rehearing en banc. (Resp. App. at 1)

STATEMENT OF THE CASE

The Respondent School Board submits the following brief statement to correct several inaccuracies and omissions contained in Petitioner's Statement of the Case.

The School Board of Broward County's Policy and Procedures Manual and evaluation system did not imply that Petitioner had "attained defacto tenure" as asserted in Petitioner's Statement of the Case. (Pet. at 2) Instead, the School Board's personnel rules and regulations established procedures for the imposition of discipline and the evaluation of non-instructional School Board employees during the term of their appointment, but did not require or imply continued employment after the expiration of the stated term of appointment (Pet. App. at B6)

Petitioner's Statement of the Case also omits any details concerning the administrative hearing which was offered to and participated in by Leslie. This formal administrative hearing gave Leslie a meaningful opportunity to respond to the charges of racial discrimination which she asserts will limit her ability to obtain future employment in the public sector. Specifically, Leslie was given the opportunity to present evidence and argument on the charges of racial discrimination, to conduct cross examination and submit rebuttal evidence, to submit proposed findings of fact, to file exceptions to any order or hearing officer's recommended order and to be represented by counsel. (Pet. App. at B9)

Petitioner's Statement of the Case notes that at the time the Petition for Writ of Certiorari was filed, the United States Court of Appeals for the Eleventh Circuit

had not ruled on Petitioner's Request for a Rehearing and Suggestion of Rehearing En Banc. (Pet. at 3) Subsequent to the filing of the Petition for Writ of Certiorari, the Eleventh Circuit entered an Order which denied Leslie's Request for a Rehearing and Suggestion of Rehearing En Banc. (Resp. App. at 1)

Finally, Petitioner's Statement of the Case asserts that "the instant appeal is from a Final Order which disposed of all claims with respect to all parties". The District Court's entry of summary judgment which was affirmed by the Eleventh Circuit, disposed of Leslie's federal claims, but did not dispose with finality, Petitioner's pendent state claims. Instead, in the absence of a viable federal claim, the District Court refrained from exercising jurisdiction over Petitioner's remaining pendent state claims. (Pet. App. at B9)

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the decision rendered by the United States Court of Appeals for the Eleventh Circuit does not conflict with the applicable decisions of this Court or with the decision of another United States Court of Appeals on the same matter and because there are no other special and important reasons for this Court to review the above-entitled case. In affirming the District Court's entry of summary judgment, the Eleventh Circuit correctly applied Florida law to Petitioner's property interest claim and rendered a decision on both the property and liberty interest claims

which was consistent with the prior applicable decisions of this Court and those of other United States Court of Appeals which have considered similar claims.

Property Interest Claim

Pursuant to Florida law, a non-instructional professional administrative school district employee, such as Petitioner Leslie, does not have a right to continued employment beyond the stated term of the employee's appointment. Unlike instructional employees, professional administrative school district employees are not eligible for continuing or professional service contract status which, as a general rule, give rise to a right of continued employment. In Florida, a professional administrative assistant whose term of appointment has expired, acquires a right to continued employment only when the employee is nominated for reappointment by the superintendent of schools. The Eleventh Circuit properly rejected Leslie's claim that she had, contrary to Florida law, a right to continued employment beyond the expiration of her appointment. No decision of this Court nor any decision by another U.S. Court of Appeals has held that a person may establish a property right to continued employment by asserting the existence of a verbal understanding which is contrary to state statutory and case law governing the employment relationship.

Liberty Interest Claim

The Eleventh Circuit also correctly held that the formal administrative hearing offered to and participated in by Leslie satisfied federal due process considerations and

precluded a claim based on the deprivation of liberty without due process of law. During this hearing, Leslie had the opportunity to present evidence and argument on the charges of racial discrimination directed against her by co-workers, cross examine any witnesses against her, submit rebuttal evidence and to be represented by counsel. Leslie's assertion that the hearing was constitutionally defective because it related to the termination of Leslie's employment for the 1990/91 school year instead of the non-renewal of her appointment for the 1991/92 school year is misplaced and unsupported by any case authority. Clearly, the comprehensive hearing provided to Leslie gave her an ample opportunity to challenge as well as tell her side of the story with respect to the complained of charges of racial discrimination and far exceeded the process due under the federal constitution with respect to a claimed liberty interest.

ARGUMENT

Property Interest Claim

The Eleventh Circuit and District Court correctly looked to Florida law to see if Leslie had a property right to continued employment after the expiration of her annual appointment for the 1990/91 school year. Depending upon their classification and duration of employment, Florida school district personnel can be employed under a "continuing contract", "professional service contract", annual contract or contract for some other fixed term. See Florida Statute § 231.36. As a general rule, continuing contracts do not expire and professional service contracts

are renewed as a matter of course each year. Florida Statute § 231.36(3)(e). Florida establishes procedures under which continuing contract and professional service contract employees may be returned to annual contract status, as well as the procedures for dismissal of these employees during the school year. Florida Statute § 231.36(3) and (4). Although procedures are likewise established for the dismissal of annual contract employees during the school year; no statute, ordinance or personnel policy entitles annual contract employees to reappointment at the end of the school year. Florida Statute §231.36(6).

Leslie, as budget director, was a non-instructional administrative employee, and more specifically classified as a "professional administrative assistant." See Florida Statute §228.041(10)(c). Effective September 12, 1967, the Florida Legislature eliminated professional administrative assistants' entitlement to continuing contracts. See, Op. Atty. Gen. 068-9 January 19, 1968. Moreover, the Florida Legislature, effective July 1, 1984, prohibited the issuance of new continuing contracts to any school district employee and established a procedure whereby school districts could issue a professional service contract to *instructional personnel* (teachers and librarians) who completed specified requirements. Florida Statute §231.36(3). Professional administrative assistants (such as Petitioner Leslie) were not and are not eligible for professional service contracts.

In Florida, school district employees who have continuing contract or professional service contract status have a property right in their employment during the school year. See, Florida Statutes §§231.36(3)(e) and (4).

Annual contract employees, such as Leslie also have a property right in their employment during the school year of their appointment, but do not have a property right to reappointment for the following school year. See, Florida Statute §231.36(3). Instead, an annual contract employee acquires a property right to continued employment only when the employee is nominated for reappointment by the superintendent of schools. *Von Stephens v. School Board of Sarasota County*, 338 So.2d 890, 894-95 (Fla. 2nd DCA 1976).

Contrary to the above-described statutes and their interpretation by the Florida Courts, Petitioner asserts that she had a property interest in continued employment beyond the expiration of her annual appointment because of conversations she allegedly had with her supervisors, satisfactory performance evaluations and the School Board's Policy and Procedures Manual. (Pet. at 11) Petitioner asserts that to hold otherwise conflicts with this Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sinderman*, 408 U.S. 593 (1972), and the Eleventh Circuit's own prior decision in *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182 (11th Cir. 1985). This assertion is without merit and attempts to create a conflict where none exists.

The law is well settled that an "informal mutual understanding" cannot create a property interest contrary to state law. See, generally, *Batterton v. Texas General Land Office*, 783 F.2d 1220 (5th Cir. 1986), *cert. denied*, 479 U.S. 914 (1986); *Common v. Williams*, 859 F.2d 467, 471-72 (7th Cir. 1988); *Driggins v. City of Oklahoma City*, 954 F.2d 1511, 1513 (10th Cir. 1992); and *Warren v. Crawford*, 927 F.2d 559,

564 (11th Cir. 1991). Petitioner acknowledges the existence of this well settled rule but asserts that the above-cited cases are distinguishable because "no section of any Florida State law prohibits the creation of a property interest in an annual contract employee such as Petitioner's positions as a professional administrative assistant." Pet. at 10. This is a clearly erroneous description of Florida law in that the Florida Legislature does not permit professional administrative school district personnel to attain continuing contract status and because annual contract school district employees do not have any right to continued employment after the expiration of their appointment unless nominated for reappointment by the superintendent of schools. As stated by the District Court, Petitioner's assertion "eliminates the distinction which exists between school district employees who have annual contract status and those who have continuing contract or professional service contract status." Pet. App. at B7.

Petitioner's argument also fails to point to any conflict between the decision of the Eleventh Circuit and the applicable decisions of this Court or the decisions of another United States Court of Appeals. Indeed, Petitioner's argument does not rest on any conflict concerning a question of federal law but, instead, appears to argue that the Eleventh Circuit and District Court have reached an erroneous conclusion with regard to applicable Florida law. In addition to being incorrect, this argument fails to set forth a sufficient reason for the issuance of a writ of certiorari for further review of the above-entitled case.

Liberty Interest Claim

A meaningful opportunity for employee name clearing precludes a due process claim based on a deprivation of a liberty interest. The liberty interest "hearing" need not take place prior to the publication of the allegedly stigmatizing information or the employment action complained of. *Campbell v. Pierce County, Ga.*, 741 F.2d 1342, 1345 (11th Cir. 1984). The hearing serves not to avert the unjustified denial of a specific benefit, but to allow the aggrieved employee to clear her name. *Buxton v. City of Plant City, Fla.*, 871 F.2d 1037, 1046 (11th Cir. 1989).

Petitioner asserts that false charges of racial discrimination lodged against her by co-workers coupled with the non-renewal of her annual appointment for the 1991/92 school year deprived her of a liberty without due process of law. The Eleventh Circuit and District Court properly rejected this claim based on the undisputed fact that Petitioner was given the opportunity to and did, in fact, participate in a formal administrative hearing concerning the complained of charges of racial discrimination. During this administrative hearing, Leslie had the opportunity to present argument and evidence as to her side of the story, cross examine the witnesses against her, present rebuttal evidence and to be represented by counsel.

Essentially, Petitioner asserts that this hearing was constitutionally defective because it arose from the termination of Leslie's employment for the 1990/91 school year rather than the non-renewal of Leslie's annual appointment for the 1991/92 school year. The constitutional issue, however, is not whether the hearing dealt with Leslie's non-renewal or termination, but rather

whether the hearing provided Leslie with a meaningful opportunity to challenge and tell her side of the story concerning the complained of charges of racial discrimination. No argument is advanced that the formal administrative hearing did not give Leslie an adequate opportunity to respond to the complained of charges of racial discrimination which allegedly implicated a protected liberty interest. Clearly, this formal administrative hearing satisfied federal due process considerations so as to preclude a liberty interest claim.

Finally, Petitioner fails to point to any prior decision of this Court or of another United States Court of Appeals which conflicts with the decision rendered by the Eleventh Circuit concerning Petitioner's liberty interest claim. No special or important reasons exist for the Court's exercise of its certiorari jurisdiction. More importantly, the Eleventh Circuit correctly decided the issue and rejected Leslie's claim.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ORDER DENYING PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC.....Resp. App. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4365

KATHLEEN LESLIE,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF BROWARD COUNTY FLORIDA,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Filed May 7, 1993)

Before: HATCHETT and BLACK, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

[X] The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

[ ] The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

[ ] A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE